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Editor's Note

The U.S. Air Force has announced the following schedule for its upcoming Maxwell AFB, Alabama, environmental law courses:

Advanced Environmental Law Course:	9-11	December, 1996
Update Environmental Law Course:	10-12	February, 1997
Basic Environmental law Course:	5-9	May, 1997

The Air Force allows the Army a specific number of students for each course. Additional information on availability for Army personnel and registration will be provided through the Bulletin as it is received from the Air Force. There is no tuition charged for the courses; however, the attendee is responsible for travel and per diem. Point of Contact (POC) for class quotas is Ms. Gant, and POC for information on course curriculum is Mr. Nixon, both of whom can be reached at (703) 696-1230, DSN 426-1230, or facsimile number extension 2940. Ms. Fedel.

Major Source Determinations For Military Installations - LTC Olmscheid

On 2 August 1996, the U.S. Environmental Protection Agency (USEPA) issued guidance to regulatory agencies that allows increased flexibility in making source determinations for military installations under the Title V Operating Permit, New Source Review (NSR), and Hazardous Air Pollutant (HAP) programs.

Some USEPA regions and states were inflexibly treating military installations as single sources for air permitting purposes. The authority to treat military installations as single sources derives from the regulatory definition of "major source." The Regulations define "major source" as any stationary sources that (1) are on contiguous or adjacent property; (2) under common control; and, (3) belong to a single major industrial grouping, as described in the Standard Industrial Classification (SIC) manual. State Operating Permit Programs, Definitions, 40 C.F.R. §70.2 (1992). Military activities fall under one industrial grouping (SIC of 97).

The Services have argued that this classification was inappropriate, since military installations include a wider variety of functions and activities, such as housing, parks, churches, etc., compared to most major sources. These activities normally are associated with a municipality rather than the common idea of an industrial plant.

USEPA's guidance states that it is appropriate to treat military installations as combinations of functionally distinct groupings of pollutant-emitting activities that may be identified and distinguished the same way that industrial and commercial sources are distinguished: on the basis of a "common sense notion of a plant." This allows military installations to separate sources along control and major industrial groupings.

Common Control Determinations: This guidance treats the different Services, National Guard, other federal agencies (which are treated as one source), and state agencies as separate sources. It also
treats leased activities as separate sources unless they perform contract-for-services activities, or support another activity that is owned or operated by the installation. Contract-for-services activities that support the military installations would be included as part of the source that they support. For activities that contract only part the their output to a military controlling entity that is located at the military installation, a common control determination would be made on a case-by-case basis.

Industrial Groupings and Support Facility Determinations: Pollution emitting activities may be desegregated further based on appropriate industrial groupings and the support facility test. Industrial groupings at military installations can be assigned appropriate 2-digit SIC codes and classified into primary and support activities. Support activities would be aggregated into the primary activities regardless of their SIC codes. Research and development facilities can be treated as separate sources.

Installations also can treat activities that are located on military installations for the convenience of military personnel, their dependents, and DOD civilian employees working on the base as separate sources. This includes residential housing, schools, daycare centers, churches, recreational parks, theaters, shopping centers, grocery stores, gas stations, and dry cleaners.

Treatment of HAPs: HAP sources can be grouped by SIC code for Title V purposes to determine Title V major source applicability. For determination of Title III major source applicability, installations must aggregate all HAPs emissions from the installation. Thus, an installation could be considered a major source under Title III, but not under Title V.

Permitting Authority Discretion To Follow Guidance: Permitting authorities have the discretion not to follow this guidance if they have a rational basis for doing so. Permitting authorities should not refuse to separate sources on an installation simply because they have not done so in the past.

Multiple Permits for Administrative Reasons: An installation that is a major source can have multiple permits for administrative purposes, as long as it ensures that all applicable requirements are included in the permits. This is useful to ensure that the certifying official is also the individual who has responsibility for the organization.

This guidance will allow installations more flexibility under the Title V program and may allow some installations to escape Title V requirements. Some installations, after evaluating the benefit of dividing into several sources, may not wish to take advantage of this guidance. For example, installations that are starting or modifying activities may want to treat the entire installation as one source in order to take advantage of the netting provisions allowed under NSR.

This guidance can be downloaded from USEPA's Technology Transfer Network (TTN), an electronic bulletin board. The TTN can be accessed by dialing (919) 541-5742. It is located in the CAA Information Area, file name DODGUID.WPF. This document also can be downloaded from the Environmental Forum on the Legal Automation Army System Bulletin Board System (LAAWS BBS), message # 98417, file name DODGUID.TXT.

Did you know? . . . The United States established its first wildlife refuge in 1903 at Pelican Island, Florida.

Analysis of EPA FY95 Enforcement Report, Part II - CPT Anders

Debate continues over interpretation of the U.S. Environmental Protection Agency's (USEPA) long-awaited Enforcement Accomplishments Report for Fiscal Year 1995 (FY95 Report). Enforcement and Compliance Assurance Accomplishments Report -- FY 1995, USEPA 300-R-96-

006 (July 1996). The report was released by USEPA's Office of Enforcement and Compliance Assurance (OECA) the week of 5 August 1996.

While USEPA's referral of 256 criminal enforcement cases to DOJ during FY95 was up from 220 cases in FY94, USEPA's FY95 enforcement numbers have dipped precipitously in nearly every other category. The number of administrative penalties assessed by EPA dropped from 1,476 to 1,105, compliance orders dropped from 2,016 to 1,864, inspections dropped from 7,526 to 7,309, and administrative civil referrals to DOJ plummeted from 430 to 214.[1] USEPA Administrator, Carol Browner, has vigorously defended the agency's new enforcement strategy, emphasizing enforcement quality over statistical quantity. "I knew from the minute I said we'd reorganize the office of enforcement that that historical baseline, the number of cases filed, would change. . . . Some people will try to use that historical baseline and the change in those numbers as a way to hit me. It is not appropriate in my mind because the point of an enforcement program is not to just file a certain number of cases. It's the effect of the cases you pursue."[2]

The FY95 Report, defending its position that "environmental results are EPA's bottom line," focuses on increased "compliance incentives" and "compliance assistance" measures. FY95 Report at 1-2. The Environmental Audit Policy[3], the Small Business Incentives Policy[4], and the Small Communities Flexible Enforcement Policy[5] are cited as examples of EPA's compliance incentives. The report lists five categories of compliance assistance: outreach (i.e., dissemination of information through seminars and services), response to specific requests for assistance, partnering efforts, research, and on-site assistance. FY95 Report at 5-1. Although it is unlikely that Federal facilities will realize any tangible benefits from the compliance incentives, installations should challenge the regulators in their regions to follow USEPA's guidance to share its enforcement information. The open channels of communication could pay big dividends in terms of avoided, or at least forewarned, enforcement attempts.

More importantly, the FY95 Report relies heavily on supplemental environmental projects (SEPs) as a demonstration of its achievement of "environmental results." OECA reports negotiation of 350 SEPs in FY95, totaling over $103 million dollars. FY95 Report at 3-13. Installations should take advantage of this SEP-friendly enforcement environment when negotiating settlements. With USEPA obviously struggling to define its enforcement role in terms of environmental benefits achieved vice fines collected, SEPs should be considered immediately, not only as a settlement tool, but as a strategic means to minimize the economic impact of the enforcement action on the command. EPA has shown a willingness not only to accept most projects that have true environmental benefits, but to permit, in at least one Army case, use of an already-completed project as a SEP to mitigate the assessed fine.

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[1] ***EPA Touts Enforcement Success, While Others Point to Significant Decline***, (quoting the FY95 Report), Inside EPA, July 26, 1996, Vol. 17, No. 30 at 8.

[2] ***Exclusive: Inside EPA Interview with EPA Administrator Carol Browner***, Inside EPA, February 9, 1996, Vol. 17, No. 6 at 8.

[3] ***Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations***, 60 Fed. Reg. 66,706 (1995).

[4] ***Interim Policy on Compliance Incentives for Small Businesses***, 61 Fed. Reg. 27,984 (June 3, 1996).

[5] Herman, Steven A., ***New EPA Policy Aids State Efforts to Help Small Communities Comply With Environmental Law***, Nat'l Envtl. Enfor. J., Dec 1995/Jan 1996, at 6.

The FY95 Report is also the first to statistically demonstrate the truly dramatic divergence in both USEPA and state inspection frequencies amongst the ten USEPA Regions. For example, of the 30,763 CAA inspections conducted during FY95, Region III had 9,991 USEPA/state stationary source inspections while Region II had 251; the Regional average was 3,076. There were 1,128 USEPA Resource Conservation and Recovery Act (RCRA) inspections and 19,636 state RCRA inspections, broken down geographically as follows:

Region 1	USEPA 43,	state 798;		
Region 2	USEPA 361,	state 3,195;		
Region 3	USEPA 20,	state 1,559;		
Region 4	USEPA 163,	state 6,836;		
Region 5	USEPA 133,	state 3,756;		
Region 6	USEPA 30,	state 1,539;		
Region 7	USEPA 269,	state 711;		
Region 8	USEPA 33,	state 484;		
Region 9	USEPA 37,	state 385;		
Region 10	USEPA 39,	state 373.		

FY95 Report at 2-2. In total, USEPA and the states combined for 90,671 inspections at regulated facilities, of which USEPA conducted (jointly or independently) 39,854. Because the FY95 Report was the first to break out these figures (the Fiscal Year 1993 Report (FY93 Report) indicates 2,980 inspections were conducted[6] and the Fiscal Year 1994 Report (FY94 Report) mentioned only that 2,000 EPA multimedia inspections were conducted[7]), future reports will permit an analysis of inspection trends.

It is also interesting to note enforcement trends occurring outside of the Federal facility realm. For example, USEPA reports administrative penalty orders issued to facilities in the following numbers under the listed statutes:

Clean Air Act (CAA): 102;
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): 23;
Clean Water Act (CWA): 212;
Emergency Planning and Community Right-to-Know Act (EPCRA): 244;
Federal Insecticide, Fungicide and Rodenticide Act (FIFRA): 160;
Resource Conservation and Recovery Act (RCRA): 91;
Safe Drinking Water Act (SDWA): 86; and,
Toxic Substances Control Act (TSCA): 187.

FY95 Report at 3-4. Because the Federal government's sovereign immunity has only been waived for violations of the solid and hazardous portions of RCRA, and recently the SDWA, Army installations are relatively unfamiliar with enforcement actions initiated under the other major Federal environmental statutes. The most heavily-enforced of these statutes are EPCRA, TSCA, and FIFRA. FY95 Report at 3-2 and 3-5. Enforcement under these statutes, rarely seen in Army experience, gives a daunting view into the future should sovereign immunity be waived in most Federal environmental statutes, as many expect.

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[6] ***Enforcement and Compliance Assurance Accomplishments Report -- FY 1993***, p. 2-6, EPA 300-R-94-003 (April 1994).

[7] ***Enforcement and Compliance Assurance Accomplishments Report -- FY 1994***, p. 2-2, EPA 300-R-95-004 (May 1995).

Finally, the FY95 Report gave accolades to the U.S. Army Alaska, even though USEPA's commendation appears suspiciously self-congratulatory: "As a result of [USEPA Region X's enforcement actions against Alaska facilities following passage of the Federal Facility Compliance Act], these facilities have turned their operations around and are now model facilities for RCRA compliance, to the point where no violations were noted during the most recent inspections. Fort Richardson was recently awarded the Green Star Award, recognized by EPA for environmental excellence, by the city of Anchorage for its efforts in recycling. Other Army facilities in Alaska are in the process of receiving similar awards from their communities." FY95 Report at 3-10.

Did you know? . . . Sulfur dioxide is the air pollutant most responsible for the corrosion of historical monuments.

Citizen enforcement provisions under the Emergency Planning and Community Right-to-Know Act of 1986 - MAJ Corbin

Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA) shortly after the tragedy in Bhopal, India, in which more than 2,000 people were killed when a Union Carbide facility released methyl isocyanide into the environment. EPCRA, 42 U.S.C. §11001, et seq. (1986). EPCRA is intended to help citizens, in cooperation with industry and government, gather reliable information on the presence and release of toxic chemicals. Only about 20 federal cases have been decided under EPCRA since its enactment.

On 23 July 1996, the United States Court of Appeals for the Seventh Circuit held that private citizens may sue under EPCRA even after violators have submitted overdue filings.[8] Citizens for a Better Environment v. The Steel Company, No. 96-1136, 1996 U.S. App. LEXIS 18262 (7th Cir. July 23, 1996). The plaintiff, a not-for-profit environmental organization, discovered apparent EPCRA violations. Citizens for a Better Environment (CBE) gave notice of intent to sue to The Steel Company, the USEPA, and appropriate state authorities. The notice alleged that The Steel Company used and released toxic chemicals covered by the EPCRA reporting requirements, and had failed to submit inventory and toxic chemical release forms. Upon receiving CBE's notice of intent to sue, The Steel Company filed its overdue forms. The USEPA did not initiate enforcement proceedings within the 60-day notice period, and CBE filed its complaint in Federal district court.

The Steel Company moved to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted. Its motion asserted that the alleged violations were "wholly" in the past and that EPCRA did not authorize citizen suits for "historical" violations. CBE argued that EPCRA authorized citizen suits to enforce the requirements of the Act, including annual filings on or before the dates set forth in the statute. The district court agreed with The Steel Company and dismissed the case.

The district court relied on the only other court of appeals ruling on this issue, a case that is factually indistinguishable from this case. Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc., 61 F.3d 473 (6th Cir. 1995). In both cases, the issue was whether citizens may seek penalties against EPCRA violators who file after the statutory deadline, after receiving notice of intent to sue, but before a complaint may be filed in the district court. In United Musical Instruments, the Sixth Circuit held that EPCRA authorized citizen suits only for failure to "complete and submit" forms, no matter when those forms were completed or submitted. The Sixth Circuit relied on Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987), in which the Supreme Court interpreted the citizen

[8] The court found the specific language of the citizen suit provision encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to prevailing or substantially prevailing parties.

suit provisions of the Clean Water Act (CWA), 33 U.S.C. §1251 et seq. In Gwaltney, the Supreme Court held that the CWA's citizen suit provisions did not allow citizens to sue for "wholly past" or "historical" violations. The CWA citizen suit provision requires civil actions against any person alleged "to be in violation" of permits required under the statute. The court found that the "most natural reading of `to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation," and concluded that citizens "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." Gwaltney, 484 U.S. at 57-59.

While examining the statute in light of the criteria of the Gwaltney court, the Seventh Circuit first read the statute according to its most plain and natural meaning, which led the Supreme Court to focus on the words "to be in violation" in the CWA. The language of EPCRA clearly differs from the language of the CWA; EPCRA authorizes citizens to sue "for failure to" comply with the statute while the CWA authorized citizen suits where a defendant was alleged "to be in violation." The plain language of the EPCRA citizen enforcement provision does not point to the present tense as does the CWA.[9] In fact, it does the opposite. The language of EPCRA contains no temporal limitation: "failure to do" something can indicate a failure past or present.[10]

Unlike the CWA, EPCRA's enforcement provisions are not cast in the present tense. EPCRA does not contain the "is occurring" language of the CWA to indicate that citizens must allege an ongoing violation. The court reasoned that the absence of language limiting citizen suits to ongoing violations, and Congress' choice of language specifically referring to past violations that are not ongoing at the time a citizen complaint is filed are strong indicators that a cause of action exists under EPCRA for violations that are not ongoing at the time a citizen complaint is filed. "If citizen suits could be fully prevented by "completing and submitting" forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information." Citizens for a Better Environment, No. 96-1136, 1996 U.S. App. LEXIS 18262 at *10. The court summarized that if citizen suits could only proceed when a violator received notice of intent to sue and still failed to spend the minimal effort required to fill out the forms and turn them in, then EPCRA compliance costs would unfairly shift from the regulated industrial users to the private citizen.

Safe Drinking Water Act Amendments - CPT DeRoma, MAJ Springer, and Mr. Scott

On 6 August 1996, President Clinton signed the Safe Drinking Water Amendments of 1996 into law. Although the amendments made numerous changes to the Safe Drinking Water Act (SDWA), many of the amendments affect funding for state water system improvements and the development of regulations by the U.S. Environmental Protection Agency (USEPA). A listing of the general sections that were amended and those that were added is available in the Environmental Law Forum via the Legal Automation Army System Bulletin Board System (LAAWS BBS). Because

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[9] Every district court that looked at the citizen suit provisions of EPCRA prior to United Musical Instruments distinguished the case before it from Gwaltney and the CWA. ***See***, e.g., Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Mfg. Corp., 772 F. Supp. 745 (W.D.N.Y. 1991); Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132 (E.D. Pa. 1993); and, Williams v. Leybold Technologies, 784 F. Supp. 765 (N.D. Cal. 1992).

[10] EPCRA's citizen enforcement provision authorizes cities to sue "for failure to complete and submit" forms "under" §§312 and 313. EPCRA, 42 U.S.C. §11046(a)(1)(A). While the United Musical Instruments court found that the use of the words "complete and submit" precluded a citizen suit, the Seventh Circuit disagreed. The Seventh Circuit concluded that congress included the words "under §§312 and 313" because it meant "in accordance with the requirements of" that section. EPCRA's legislative history makes it clear that Congress placed great importance on the timing element of the reporting requirements. ***See*** Senate Committee on Environment and Public Works, Superfund Improvement Act of 1985, S. Rep. No. 11, 99th Cong., 1st Sess., 14-15 (Mar. 18, 1985).

most of the amendments directly affect state water systems and the USEPA, Army compliance with the amendments is not expected to be problematic. Furthermore, SDWA compliance problems in Army water systems are minimal and infrequent. The leading deficiencies identified by the Environmental Compliance Assessment System (ECAS) have been equipment deficiencies, incomplete records pertaining to monitoring, permits, or operation and maintenance, and missing or incomplete emergency contingency plans. Those provisions of the amendments that are likely to have a direct impact on Army installations are discussed below.

One of the most significant changes was the expansion of the waiver of sovereign immunity. This change was addressed at length in the August 1996 Environmental Law Bulletin, also available in the Environmental Forum in the LAAWS BBS. The waiver, as amended, subjects Federal facilities that own or operate public water systems or any facility in a wellhead protection area to the provisions of the SDWA, as well as state and local safe drinking water laws. With regard to fees and fines assessed under the Act via the waiver, installations should be aware of three issues. First, fines may only be paid for legitimate violations occurring ***on or after*** 6 August 1996. Second, as with any environmental fee paid by the Army, a fee must be reasonable and meet the test of Massachusetts v. United States, 435 U.S. 444 (1978). In Massachusetts, the Supreme Court held that a fee is deemed an impermissible tax when (1) the imposed charges discriminate against state functions; (2) the charges are not based on a fair approximation of use of the regulatory system; and, (3) the charges are structured to produce revenues that exceed the total cost to the Federal Government of the benefits to be supplied. If a fee meets these requirements and is reasonably proportionate to the benefits provided, then the fee is valid. Finally, fines and penalties collected from a federal agency by a state under the SDWA may only be used for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.

Another change with a significant impact is the amendment of public notice provisions in the SDWA. The notice period for violations that could have a serious effect on human health has been reduced from fourteen days to twenty-four hours. The amendments also require that owners and operators of a public water system notify persons served by the system of (1) any failure on the part of the system to comply with an applicable maximum contaminant level or treatment technique requirement of, or a testing procedure prescribed by, a national drinking water regulation; (2) failure to perform monitoring required by the SDWA; (3) failure to comply with a schedule prescribed in accordance with a variance or exemption under the Act; (4) notice of the existence of the exemption or variance; and, (5) notice of unregulated contaminants, if required by the USEPA. The USEPA is required to promulgate regulations that prescribe the manner, frequency, form, and content for giving notice under the SDWA, and states may adopt their own regulations, as well. The form and manner of notifications will depend on the severity of the potential effects of the violation. The target date for the regulations is 6 August 1998. Also due out by this date are regulations addressing the issuing of annual reports by community water systems to consumers that notify customers about water contaminants and the health effects of the contaminants. At the election of the state governor, means of notice to customers may be varied, depending on the size of the system. For systems serving over 10,000 persons, notice will be achieved through direct mailing of individual reports. For systems serving between 500 to 10,000 persons, the notice requirement may be satisfied by publishing the information in local newspapers. For systems serving fewer than 500 persons, the requirement may be satisfied simply by making the information available upon request. Most Army drinking water facilities service less than 10,000 persons and may be able to take advantage of the less stringent annual report notification requirements. Installations should monitor developments of these guidelines in their areas and take advantage of opportunities offered by states during the regulatory process to voice their opinions on appropriate and efficient methods for providing notice to their consumers.

EPA's Proposal for Integrated Federal And State Hazardous Waste Management - MAJ Anderson-Lloyd

A U.S. Environmental Protection Agency (USEPA) staff member in the Office of Solid Waste, Al Collins, proposed to Agency officials a management plan that would subject only the highest risk hazardous waste to federal control under Resource Conservation and Recovery Act (RCRA) Subtitle C regulations. Under the "RCRA 21" proposal, named for the number of years of RCRA regulation at the beginning of the 21st century, states would regulate most lower risk waste under their Subtitle D programs. State regulation would consist of contingent management based on the level of risk posed by the waste.

This proposal is in line with recent USEPA initiatives such as the Hazardous Waste Identification Rule in proposing deregulation of lower risk waste by moving them from regulation under Subtitle C to Subtitle D. RCRA 21, however, would include in state management more industrial solid waste than is currently regulated. Certain oil and gas processing and combustion waste (Bevill waste) would also be subject to RCRA regulation under this scheme. USEPA would set a national goal for both hazardous and industrial wastes based on risk to human health and the environment. The proposal would result in a much lower percentage of waste managed by the federal program, eliminating lower risk waste from the requirements of federal permitting, land disposal restrictions, and corrective action.

The author of the plan believes RCRA 21 would promote waste minimization, pollution prevention, and flexible treatment with no increased risk to human health and the environment. Although the proposal was well received by top Agency officials, there has been no decision on how or if the concept will be implemented.

Prudent Disclosure of ECAS Results - CPT Anders

Recently, an installation underwent an Environmental Compliance Assessment System (ECAS) review, and the results showed a marked improvement in the environmental program. While the results certainly merited praise, the report contained several negative findings, albeit technical and procedural in nature. An individual at the engineering office, without coordinating with the Pubic Affairs Office (PAO) or the Staff Judge Advocate (SJA) orally relayed the results to a local reporter in attempt to earn the installation some good press. The representations made during the call prompted the reporter to request the actual ECAS findings.

The Freedom of Information Act (FOIA) establishes a presumptive right of individual or corporate persons to request information from a Federal agency regarding the activities and operations of that agency. FOIA, 5 U.S.C. §552 (1986). HQDA policy on FOIA requests for ECAS results is that the final ECAS report does not fall within FOIA's deliberative privilege exemption, and must therefore be released. FOIA, 5 U.S.C. §552(b)(5). ***See***, Memorandum for Commander, U.S. Toxic and Hazardous Materials Agency, from COL William McGowan, Chief, Environmental Law Division, (4 June 1992).

In all likelihood, the newspaper's spin on the story (if there is one) will be congratulatory, and the state environmental agency and the U.S. Environmental Protection Agency Region will view the results (if they see them) the same way. These enforcement agencies, however, may now have access to detrimental information they would not otherwise have had. While environmental program improvements are indeed commendable and the installation should seek community recognition and commendation, watch for dormant pitfalls. Voluntary disclosure of such information is fine, as long as the installation PAO and the SJA have had the opportunity to evaluate potential fallout and the commander is willing to accept any risks.